control over the package for their own purposes clearly constitute[s] a 'seizure,'" 466 U.S. at 120. Of course, even when a court believes that this Court would reach a different conclusion had it analyzed a question more extensively, disregarding the controlling rule is still not an option. See *Agostini v. Felton*, 501 U.S. 203, 237 (1997); Pet. App. 34a (Colloton, J., dissenting) ("Absent a revision of doctrine by the Supreme Court, the NSP investigators effected a 'seizure' of Va Lerie's bag").

The Government, echoing the Eighth Circuit majority, emphasizes that the facts of *Jacobsen* and this case are distinguishable. No two cases are factually identical, but what is striking is that, to the extent there are differences relating to factors the *majority* below identified as constitutionally significant, Mr. Va Lerie's is plainly a *stronger* case for seizure than was *Jacobsen*. See Pet. App. 29a-32a (dissenting opinion).

The Government fully embraces the Eighth Circuit's pyritic notion that "custody" distinguishes the two cases, declaring (Opp. 10) that "[u]nlike the Federal Express employees in *Jacobsen*, who invited federal agents to take charge of the package, * * * the bus company in no way ended its bailment of the luggage entrusted to it for transportation to the traveler's destination." So phrased, this may sound plausible, but what the Government calls "tak[ing] charge" in *Jacobsen* consisted of removing the package to a desk in the Federal Express facility, where it remained in view and presence of company employees, 466 U.S. at 111 – and Federal Express in fact delivered the package to the Jacobsens. See Pet. App. 31a (dissenting opinion). For the Eighth Circuit decision to make sense, however, it is not enough to accept that *Jacobsen* involved a deprivation of custody; one must *also* agree that officers *did not* have "custody" of Mr. Va Lerie's garment bag when they took "physical possession and control of [it] * * * in a room inside the bus terminal without Greyhound personnel

present," *id.*[6]

Indeed, the Opposition supplies vivid confirmation of the confusion-sowing potential of the Eighth Circuit's nebulous test. The Government (Opp. 12) justifies its assertion that the decision below is "consistent" with Colorado and Florida decisions finding luggage seized, by noting that the police officer in *Ortega* "'exercised control over defendant's property'" (quoting 34 P.3d at 992), and those in *LaSalla* "removed the suitcase from airline's possession." Opp. 13. But no one has disputed that the agents in this case removed the garment bag from Greyhound's *possession*, and, the district court likewise found "thorough [government] * * * control," Pet. App. 49a. Indeed, the thrust of the opinion below – repeated in the Government's submission (see Opp. 8) – is that "simple 'dominion and control'" does not establish seizure.[7]

D. *Jacobsen*, Not the Lower Court's Test, Is Correct As A Matter of Fourth Amendment Law

Although the Opposition intimates that more "extended analysis" would have led the *Jacobsen* Court to a rule like the Eighth Circuit's, it proffers no such analysis; indeed, it does not respond in any way to the Petition's showing (Pet. 23-29) that

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[6]The Government's attempt (Opp. 10) to derive traction from the fact that agents in *Jacobsen* opened the package fares no better. The pivotal fact was that the package was already open when handed to the DEA agents – and their examination of its contents was consistent with what the carrier had already done. Indeed, these facts were the basis for the holding that examination was not a *search*. 466 U.S. at 119-20.

[7]It would be hard to find a case less amenable to being distinguished on its facts than *LaSalla* – which held that police seized a suitcase by taking it from a conveyor belt and transporting it 35 feet, to a public space within the airport terminal, although the defendant "d[id] not argue that his possessory interest in his luggage [or] * * * his freedom to travel was impaired," *id.* at 1040 (dissent). As with *Jacobsen*, the only evident distinctions – *e.g.*, (1) that events took place in an airport, where security concerns are high, and (2) that the bag was "randomly selected," *id.* at 1038, rather than singled out based on any allegedly suspicious characteristic – are ones that might support lower Fourth Amendment protection.

Jacobsen is not the only – or necessarily the most important – impediment to the lower court's interpretation of the Fourth Amendment.

As the Petition explained, equating seizure with government assertions of "dominion and control" over property comports with the plain language of the Constitution, see Pet. 23 (citing *California v. Hodari D.*, 499 U.S. at 624), and this Court's cases stand strongly against the intuition at the heart of the contrary rule – that, for Fourth Amendment purposes, what the owner doesn't know doesn't hurt him. See Pet. 14-15, 25 n.12. Rather, both the Court's most specifically relevant precedents (see Pet. 15) and the broad principles of its Fourth Amendment doctrine, see Pet.27-29, establish that the considerations that have led lower courts to *exempt* brief detentions of property from the Fourth Amendment reasonableness requirement bear instead on how that constitutional standard is satisfied.

Finally, the Petition showed (at 24-26) that the lower courts' claims that common law norms support their rule have been especially seriously mistaken. Instead of merely protecting a right to timely return of his property, the law has entitled a traveler to expect that it will be handled exclusively *for his purposes* while in a carrier's possession.

The Opposition does not take issue with this any of this. (Indeed, apart from noting *Jacobsen*'s citation to *Texas v. Brown* and the Petition's reference to *Van Leeuwen*, it does not discuss any of this Court's other Fourth Amendment precedents).

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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